

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rupes Supply Inc
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-24-1338-3647

Applicant's File No. N/A

Insurer's Claim File No. 32-56H3-32V

NAIC No.

ARBITRATION AWARD

I, Kihyun Kim, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: the Assignor

1. Hearing(s) held on 08/16/2024
Declared closed by the arbitrator on 08/16/2024

Marc Schwartz, Esq. from Marc L. Schwartz P.C. participated virtually for the
Applicant

Angel Yang, Esq. from Abrams, Cohen & Associates, PC participated virtually for the
Respondent

2. The amount claimed in the Arbitration Request, **\$4,139.99**, was NOT AMENDED at the oral hearing.
Stipulations WERE NOT made by the parties regarding the issues to be determined.
3. Summary of Issues in Dispute

The issue presented is whether the DME was medically necessary.

The Assignor (JGD) was a 33-year-old female who was the driver an automobile that was involved in an accident on September 18, 2023. Applicant seeks reimbursement in the amount of \$4,139.99 for a surgical recovery ultrasound therapy device provided to the Assignor on December 28, 2023. Reimbursement was denied based on the peer review by John Xethalis, M.D., dated February 15, 2024.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the closing of the hearing, and such documents are hereby incorporated into the record of this hearing. The hearing was held by Zoom video conference. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses. Respondent presented no evidence regarding Applicant's charges and the fee schedule at the hearing.

The Assignor was a 33-year-old female who was injured in an automobile accident on September 18, 2023. Following the accident, the Assignor was transported by ambulance to the hospital, where she was evaluated, treated and released the same day without admission. The Assignor later sought treatment and testing for her injuries from various providers, who started her on a course of conservative treatment, including physical therapy and acupuncture.

On December 21, 2023, the Assignor underwent an arthroscopy of the right shoulder performed by Robert Drazic D.O., and assisted by Shmuel Kaufman, P.A., at a facility in Oradell, New Jersey. On December 28, 2023, apparently as part of the Assignor's post-operative rehabilitation, Applicant provided the Assignor with a surgical recovery ultrasound therapy device prescribed by Dr. Drazic on December 22, 2023. Applicant billed Respondent for the DME and Respondent timely denied Applicant's claims based on the February 15, 2024 peer review by John Xethalis, M.D., who found the DME to be medically unnecessary.

Applicant now seeks reimbursement in the amount of \$4,139.99 for the surgical recovery ultrasound therapy device provided to the Assignor on December 28, 2023.

Legal Framework - Medical Necessity - Peer Review

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

To support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." *See Provvedere, Inc. v. Republic W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald

assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Peer Review - John Xethalis, M.D., dated February 15, 2024

Respondent relies upon the peer review report of John Xethalis, M.D., dated February 15, 2024, in asserting lack of medical necessity for the surgical recovery ultrasound therapy device provided to the Assignor on December 28, 2023. The peer report apparently discusses the medical necessity of other items not at issue in this proceeding. Respondent, however, only uploaded the first three and last five pages of the fourteen page peer review, which does not include the bulk of the discussion regarding the DME at issue herein. The pages uploaded stated, without any adequate explanation or reference medical authorities or to the Assignor medical record that: "The type, intensity, frequency, and duration of the provided post-operative DME and topical medications are inconsistent with accepted medical standards and inappropriate for the severity of the documented injury (ies) or condition because the provided DME does not provide any additional benefit and is not superior to other conservative therapies such as physiotherapy. The standard of care in this case was to prescribe oral analgesics for pain and associated symptoms." The peer reviewer concluded that the post-operative surgical recovery ultrasound therapy device provided to the Assignor on December 28, 2023 were not medically necessary.

At the hearing, Applicant's counsel asserted that the partially uploaded peer review was insufficient to meet Respondent's burden to set forth a factual basis and medical rationale for its determination that there was a lack of medical necessity for the services rendered.

Though not discussed at the hearing, I note that the cover letter to Respondent's submission from Respondent's counsel purports quote the relevant portions of Dr. Xethalis's peer review, stating, in pertinent part, that:

Dr. Xethalis wrote in pertinent part:

Regarding the Surgical Recovery Ultrasound Therapy Device:

The claimant was provided a home Surgical Recovery Ultrasound Therapy Device for post-operative pain control. In this case, as per the medical records, the right shoulder arthroscopy was not complicated. The postoperative pain of the right shoulder would be expected to respond to conservative treatment such as analgesics and a course of Physical Therapy. If ultrasound treatment was desired, it could have been provided as part of the prescribed post-operative Physical Therapy sessions. The claimant was prescribed this device just one day after the right shoulder arthroscopy. Ultrasound treatments should be done under the supervision of a licensed Physical Therapist, not at home with no supervision. The claimant should have been provided with this device only if the claimant's post-operative pain did not respond to the post-operative physical therapy sessions. The effectiveness of ultrasound therapy is not proven, and also with the use of physical therapy, it has not been shown to have any additional effects. The Surgical Recovery Ultrasound Therapy Device was not medically necessary in this case.

"Ultrasound may be a treatment modality that you are exposed to during your physical therapy treatments. Research calls into question its efficacy, so if your PT does use it, be sure to understand the goals of treatment and the necessity of the treatment" (Does Ultrasound Therapy Really Work - [verywellhealth.com](https://www.verywellhealth.com), Updated on February 01, 2023, Medically reviewed by Mohamad Hassan, P.T.)

Rebuttal - Drora Hirsch, M.D., dated July 16, 2024

To refute the February 15, 2024 peer review by Dr. Xethalis, Applicant relies principally upon a rebuttal, dated July 16, 2024, from Drora Hirsch, MD. Initially, the rebuttal presents a brief summary of the Assignor's medical history before addressing Dr. Xethalis's peer review. Dr. Hirsch respectfully disagreed with the peer review report, and opined that based upon a review of documents, taking into consideration the Assignor's history, the history of the injury, the Assignor's complaints, the clinical findings, and a review of the medical history, and in accordance with the generally accepted standards of care in the relevant medical community, the medical supplies provided on December 28, 2023 were medically necessary, within a reasonable degree of medical certainty.

Dr. Hirsch noted that the Assignor "sustained traumatic injuries to her right shoulder in the motor vehicle accident on 9/18/2023 and developed complaints of pain, following which she was indeed initiated on a course of physical therapy." She found, however, the the Assignor's right shoulder symptoms continued to bother her despite conservative treatment, and asserted that more aggressive treatment was necessary and right shoulder arthroscopy was recommended as an appropriate treatment plan. Dr. Hirsch contended

that waiting for the response to conservative care or for the physiological status to deteriorate in a patient who is already in immense pain due to the traumatic injuries suffered in the motor vehicle accident could ultimately be detrimental for the patient's recovery. She further maintained that the severity of the injuries can be determined on the basis of intra-operative findings which revealed partial rotator cuff tear, SLAP tear and labral tear.

Dr. Hirsch further asserted that with respect to the partial rotator cuff tears, surgery is indicated for a clinical presentation of a rotator cuff tear. Citing medical authority, she maintained that partial rotator cuff tears should be surgically treated because if left untreated, they will get worse with time. Moreover, She indicated that labral tears can be, and often are, traumatically induced, and that labral tears can be very painful and debilitating. She contended that surgical repairs are indicated because they are very effective with a high success rate. She also noted that with respect to injections, such injections would not be beneficial because they does not actually repair anything (especially tears) within the joint and only sometimes temporarily mask some of the symptoms. She maintained that injections cannot alter the need for surgery, and that the decision of performing the surgery was appropriate.

Dr. Hirsch asserted that shoulder arthroscopy is commonly used to treat pathologic shoulder conditions including rotator cuff tears, labral tears, proximal biceps pathology, loose bodies, degenerative arthritis, adhesive capsulitis, and subacromial impingement. She further found that Arthroscopy has several advantages, including a more comprehensive view of intra-articular pathology, smaller incisions with decreased morbidity, the potential for more rapid rehabilitation, and a faster return to work. Dr. Hirsch cited and summarized literature that supported the importance of shoulder arthroscopy.

Dr. Hirsch noted that the Assignor's clinical exam suggested rotator cuff and labral tear, which was subsequently confirmed at the time of the surgery. She maintained that the decision of arthroscopic surgical intervention was not solely based on review of the MRI report; it was also based on the positive clinical findings throughout the physical examination of the patient. She conceded that it "seems like Dr. Xethalis is trying to overlook the severity of patient's condition, as the clinical presentation of this patient indicated rotator cuff tear and labral tear." She maintained that in this case, the Assignor had a combination of subjective complaints and positive clinical findings, which demonstrated the need for surgery. She maintained that based on her discussion, the right shoulder arthroscopy was medically necessary, and asserted that since the right shoulder arthroscopy was medically necessary, the associated post-operatively DME including Cold and Compression Therapy Unit for Shoulder and Surgical Recovery Ultrasound Therapy Device were also medically necessary.

Dr. Hirsch also explained that the goal of prescribing DME is to facilitate the healing process quicker and allow other therapeutic modalities to work.

Specifically, with respect to the surgical recovery ultrasound therapy device, Dr. Hirsch indicated that the SAM device "was prescribed with the view that this patient would benefit from its use on those days and at those times when the patient is not receiving in-office treatment. Moreover, durable medical equipment are the medical supplies that

are prescribed exclusively to use at home for a speedy recovery of a patient's illness." She noted that the SAM device is designed for use at home, and that the SAM device maintains an official referral code as durable medical equipment.

Dr. Hirsch noted that as a self-applied treatment, SAM therapy engages patients directly, empowering them to take a direct role in administering their treatment and involving them with care. She maintained that patients who are actively involved with their care generally have better outcomes to their treatment.

Dr. Hirsch maintained that the use of LITUS (Low Intensity Therapeutic Ultrasound) in the treatment of tendon, muscle, ligament, and tendon-bone junction injuries is supported by the literature. She explained that: "An advantage of using therapeutic ultrasound at lower intensities is that it can be safely used in the home-setting for long treatment times, in some cases up to 8 hours. Given the frequency and debilitating nature of soft tissue injuries, LITUS has the potential to reduce healing time, overall healthcare costs, and negative side effects, as well as improve quality of life."

Dr. Hirsch continued to explain that "The primary mechanism of action for the SAM device and the multi-hour treatment is accelerated healing and pain reduction. SAM device is the first and only FDA-cleared wearable ultrasound device delivering multi-hour sustained acoustic medicine for accelerated healing and pain reduction. It provides continuous ultrasonic waves that penetrate up to 5 cm into the tissue."

Dr. Hirsch conceded that in this case, the Assignor had undergone right shoulder arthroscopy. She noted that two of the main specifically named medical indicators for ultrasound are to extend muscle tissue or accelerate soft tissue healing. She asserted that since both of these are goals of a therapeutic program after shoulder surgery (increasing range of motion through stretching/lengthening and accelerating healing) ultrasound is specifically recommended.

Analysis - Medical Necessity - DME - DOS 12/28/23

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Respondent failed to meet its initial burden to set forth a factual basis and medical rationale for its determination that there was a lack of medical necessity for the prescribed surgical recovery ultrasound therapy device provided to the Assignor on December 28, 2023. Respondent only uploaded a portion of the Dr. Xethalis's peer review, which apparently does not include the bulk of his discussion regarding the DME at issue herein. The pages uploaded to the record included Dr. Xethalis's conclusion that: "The type, intensity, frequency, and duration of the provided post-operative DME and topical medications are inconsistent with accepted medical standards and inappropriate for the severity of the documented injury (ies) or condition because the provided DME does not provide any additional benefit and is not superior to other conservative therapies such as physiotherapy." However, I find that such opinion is conclusory, as such statement was provided without any adequate explanation or reference medical authorities or to the Assignor medical record. While the cover letter to Respondent's submission purports quote the relevant portions of Dr. Xethalis's peer review, it still remains unclear whether the portion of the peer review provided from Respondent's counsel represents the entirety of Dr. Xethalis's discussion and opinion.

In any event, even if quoted portions of Dr. Xethalis's peer review were found to be sufficient to meet Respondent's initial burden to set forth a factual basis and medical rationale for Respondent's determination that there was a lack of medical necessity for the prescribed DME, Respondent's lack of medical necessity defense would still fail as Applicant has submitted a more persuasive rebuttal by Dr. Hirsch, dated July 16, 2024, which along with Applicant's supporting medical records, meaningfully and adequately addresses and rebuts the assertion and opinions by Dr. Xethalis with respect to the medical necessity of the surgery and the associated services, including the disputed DME. The DME was prescribed by Dr. Drazic and was provided to the Assignor on December 28, 2023 following the arthroscopy of the right shoulder performed by Dr. Drazic on December 21, 2023. Among other things, Dr. Hirsch highlighted the Assignor's complaints and positive objective findings from the Assignor's medical record demonstrating the Assignor's right shoulder injuries, including the suspected partial rotator cuff tear and labral tear, which were actually confirmed by Dr. Drazic's own observations during the surgery, and explained that the Assignor failed to respond to months of conservative modalities of treatment. She specifically notes that the decision of performing the surgery was not solely based on the MRI study; it was also based on the positive clinical findings documented throughout the Assignor's medical records. Dr. Drazic also provided medical authorities that explained the medical indications for arthroscopic shoulder surgery in the case and supported the need for the surgery for the Assignor. Moreover, the rebuttal explained the uses and benefits of the prescribed DME and why the prescription of such devices was appropriate for the Assignor in this case. Among other things, Dr. Hirsch noted that two of the main medical indicators for ultrasound "are to extend muscle tissue and accelerate soft tissue healing," and asserted that "[s]ince both of these are goals of a therapeutic program after shoulder surgery (increasing range of motion through stretching/lengthening and accelerating healing) ultrasound is specifically recommended. While the peer reviewer apparently asserted that the postoperative pain of the right shoulder would be expected to respond to conservative treatment such as analgesics and a course of physical therapy, and the peer reviewer apparently questioned the proven effectiveness of ultrasound therapy, the peer reviewer did not however adequately explain how or why the prescription of the ultrasound unit deviated from any specific standard of care in this case. Simply questioning the proven effectiveness of a device, or the superiority, cost-effectiveness or the efficacy of a device as compared to an alternative, without sufficient context, detail or explanation is insufficient to meet Respondent burden. At most, I perceive a difference of opinion, rather than a demonstration of deviation from generally accepted practice in the treating surgeon's decision to prescribe the post-operative supply. Also as noted previously, Dr. Hirsch in the rebuttal also cited medical authority that supported the use and effectiveness of the device for the Assignor. In any event, under the factual circumstances presented, I find it appropriate to give some deference in this case to the referring and treating physician. When faced with two inconsistent, but credible opinions, deference would be accorded to the treating provider, who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services for the Assignor. Ultimately, I find the rebuttal and Applicant's supporting medical records and arguments to be more

credible and persuasive than the peer review. Based on the totality of the evidence in the record, I find that Applicant has rebutted Respondent's defense and established the medical necessity of the DME at issue.

Based on all of the foregoing, Applicant is entitled to reimbursement in the amount of \$4,139.99 for a surgical recovery ultrasound therapy device provided to the Assignor on December 28, 2023.

Conclusion

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of \$4,139.99, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle
- ☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Rupes Supply Inc	12/28/23 - 12/28/23	\$4,139.99	Awarded: \$4,139.99
Total			\$4,139.99	Awarded: \$4,139.99

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/29/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from February 29, 2024, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR 65-4.6(d).

- D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY

SS :

County of Suffolk

I, Kihyun Kim, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/16/2024

(Dated)

Kihyun Kim

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
Unique Modria Document ID:
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Electronically Signed

Your name: Kihyun Kim
Signed on: 09/16/2024